IN THE SUPREME COURT OF THE UNITED STATES

Dewey Harold Sizemore
Petitioner

VS.

United States of America
Respondent

No. _____

MOTION FOR LEAVE TO FILE OUT OF TIME PETITION FOR WRIT OF CERTIORARI

The petitioner, Dewey Sizemore, moves this Court to allow him to file his Petition for the Writ of Certiorari out of time. The petition has been submitted to this Court together with this motion.

In support of his motion, petitioner would show that, as set forth in detail in the accompanying affidavit of counsel, petitioner's counsel erroneously thought that the provisions of 28 U. S. C. §2101 (c) governed the filing of this petition, rather than Rule 22, Revised Rules of the United States Supreme Court. Therefore, counsel believed there were 90 days in which the petition could be filed, rather than 30 days. The petition should have been filed by July 20th. 1978, but was not mailed to the Court until July 31st. 1978, eleven days late.

Petitioner submits that the error of his counsel should not deprive him of the right to have his petition considered on its merits by this Court and asks that this Court once again "be generous in exercising . . . (its) discretion to forgive a mistake and waive the consequence of negligence," Pittsburgh Towing Co. V. Mississippi Valley Barge Line Co., 385 U. S. 32, 32-33 (1966), and thus grant him leave to file his Petition out of time, and that it be considered on its merits.

Respectfully submitted,
Witt, Gaither & Whitaker

by Hugh J. Moore, Jr.
Hugh J. Moore, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st. day of July, 1978, three copies of the Motion for Leave to File Out of Time Petition for Writ of Certiorari were mailed, postage prepaid, to John Cary, United States Attorney, U. S. Post Office and Courthouse in Knoxville, Tennessee, 37302, and Solicitio General, Department of Justice, Washington, D. C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Hugh J. Moore, Jr.

Hugh J. Moore, Jr.
1100 American National
Bank Building
Chattanooga, Tennessee 37402

STATE OF TENNESSEE

COUNTY OF HAMILTON

AFFIDAVIT

My name is Hugh Jacob Moore, Jr., and I am an attorney, practicing in Chattanooga, Tennessee. I am a member of the Tennessee Bar, and have been admitted to practice before the Supreme Court of the State of Tennessee, United States District Courts for the Eastern and Middle Districts of Tennessee, the United States Sixth Circuit Court of Appeals, and the Supreme Court of the United States of America.

On August 9, 1977, I was appointed to represent Dewey Sizemore at his trial for counterfeiting and conspiracy charges in the United States District Court for the Eastern District of Tennessee, City of Chattanooga. The trial was held on October 10 and 11, 1977, and after deliberation, the jury found Mr. Sizemore guilty as charged on all counts.

Following the trial, and after the filing of the notice of appeal on October 31, 1977, the District Court issued an order on November 14, 1977, denying Mr. Sizemore's motion to proceed in his appeal in forma pauperis. Subsequently, I was retained by Mr. Sizemore for the appeal.

The appeal was taken, a 43 page brief filed, and oral argument held before the United States Sixth Circuit Court of Appeals in Cincinnati, Ohio. On June 20, 1978, the Coutt of Appeals entered its judgment affirming the judgment of the District Court.

At this point, I checked what I thought to be the appropriate statute setting the time limit for filing a Petition for Writ of Certiorari, 28 U.S.C. § 2101 (c), and thereafter operated under the erroneous impression that my client had ninety days in which to file his petition.

On June 29, 1978 two weeks prior to issuance of a mandate by the Sixth Circuit, I filed a Motion for Continuance of Bail on behalf of Mr. Sizemore with the United States District Court in Chattanooga. Exhibits to that motion were filed on July 6 and July 18, 1978. I believed such application for continuance of bail to be proper and appropriate, pursuant to the provisions of 18 U.S.C. §§ 3146 and 3148.

After the motion for continuance of bail had been filed, the Court of Appeals issued its mandate on July 13, 1978, and I received notice of that mandate on July 15, 1978.

Still believing that I was within the time allotted me by statute, I awaited action of the District Court on the Motion for Continuance of Bond. On July 26, 1978, the District Court issued both its Order on Mandate, and an order staying that mandate for 30 days to allow Mr. Sizemore to apply to the Sixth Circuit Court of Appeals in Cincinnati for "a further stay," or withdrawal of the mandate. This order was received by me on July 27, 1978.

Upon receipt of these orders, and in an attempt to determine how application for withdrawal of the mandate should be made to the Court of Appeals, I learned for the first time that my client's petition was governed by the 30 - day time limit set out in Rule 22 of the Supreme Court Rules, rather than the 90 - day limit established in 28 U. S. C. § 2101 (c).

At that point, I discussed the matter with petitioner, and determined that petitioner desired that a Petition for a Writ of Certiorari in his behalf be filed. I then discussed the matter with an official in the office of the clerk of the Supreme Court of the United States (Mr. Shade), and upon learning that the 30 - day time limit was waivable,

proceeded immediately to the preparation of petitioner's application for a Writ of Certiorari, submitted concurrent with this motion and affidavit.

Further this affiant sayeth not.

Hugh J. Moore, Jr.
Hugh J. Moore, Jr.

Subscribed and Sworn to
Before Me This 28th Day
of July, 1978.

/s/ Sue A. Ryan
Notary Public

My Commission Expires: July 8, 1979

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78- 181

DEWEY H. SIZEMORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HUGH J. MOORE, JR.
CARTER J. LYNCH, III
Witt, Gaither, & Whitaker
1100 American National Bank Building
Chattanooga, Tennessee 37402
615/265-8881
Attorneys for Petitioner

INDEX

CITATIONS

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-_____

DEWEY H. SIZEMORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 20, 1978, in the above-styled cause, affirming the judgment of the United States District Court, Eastern District of Tennessee, Southern Division, entered on October 31, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. No opinion was rendered by the District Court for the Eastern District of Tennessee.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit Affirming the judgment of the District Court was entered on the 20th day of July, 1978. Jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, §1254(1), providing in pertinent part for granting of review by writ of certiorari upon the petition of a party to a criminal case after rendition of judgment by a United States Court of Appeals. A motion to allow the filing of this Petition out of time is attached to the Petition.

QUESTIONS PRESENTED

I.

Whether the Circuit Court erred in refusing to reverse petitioner's conviction because the government failed, during the course of pretrial discovery, to reveal substantial payments made to its chief witness, in clear violation of this Court's mandate in **Brady** v. **State of Maryland**, 373 U.S. 83 (1963).

II.

Whether the Circuit Court erred in refusing the reverse the judgment of the District Court for admitting evidence of prior criminal activity on the part of the petitioner consisting of printing advertisements with the facsimile of genuine currency on them and of petitioner's notification by a U.S. Secret Service Agent that the printing of such advertisements was a violation of the United States

Currency Laws, which activity and notification occurred in 1974, three years prior to trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this cause is the due process clause of the Fifth Amendment to the United States Constitution:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property betaken for public use, without just compensation.

The statutory provisions involved in this cause are as follows:

Title 18 of the United States Code Section 371:

"Conspiracy to commit offense or to defraud United States.

If two or more persons conspire to either commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000. or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such

misdemeanor. (June 25, 1948, ch. 645, 62 Stat. 701)."

Title 18 of the United States Code Section 471:

"Obligations or securities of United States.

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000. or imprisoned not more than fifteen years, or both. (June 25, 1948, ch. 645, 62 Stat. 705)"

Title 18 of the United States Code Section 474:

"Plates or stones for counterfeiting obligations or securities.

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowlingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other

security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engravings, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. (June 25, 1948, ch. 645, 62 Stat. 706)"

STATEMENT OF THE CASE

PROCEDURE:

On June 9, 1977, Dewey Sizemore was arrested by Secret Service agents and charged with violations of Federal counterfeiting laws. The Grand Jury for the Eastern District of Tennessee named Sizemore, together with his wife and an acquaintance, in a four-

count indictment on July 8, charging the trio with conspiracy and violations of various counterfeiting laws. At his July 15 arraignment, before U.S. District Judge Frank W. Wilson, Sizemore pleaded not guilty to all charges.

The case was tried before a jury October 10-11, and on October 11, Sizemore was found guilty on all counts. On October 31, Sizemore was sentenced to five years in the penitentiary on the conspiracy count (I), and six years on each of the counterfeiting counts (II), (III), (IV), all time to be served concurrently.

Notice of appeal was filed October 31, 1977. On July 20, 1978, the United States Court of Appeals for the Sixth Circuit entered its judgment, affirming Petitioner's conviction.

FACTS

Between 11:00 p.m. and 12:00 midnight on June 9, 1977, Secret Service agents executed a search warrant at The Print Shoppe, 37-2nd Street, S.W., Cleveland, Tennessee. The shop was operated by Dewey Sizemore.

During their search the agents seized slightly more than $250,000.00 in partially-printed counterfeit $20.00 bills and other items including a negative, a plate, and photographs.

Mrs. Louise McCracken Goins (Hooker), who had been living with one of Sizemore's co-defendants, was the government's chief witness in this case. She told agents that she heard the manufacture of counterfeit money discussed at the shop.

At trial Mrs. Goins (Hooker) also testified that she was paid $1,500.00 by the Secret Service prior to trial. Petitioner's counsel filed a timely discovery motion, seeking disclosure of any agreements between the government and any prosecution witness. The government responded that there were no such agreements.

Only upon cross-examination of Mrs. Goins (Hooker) did petitioner's counsel learn that the government's chief witness had received this $1,500.00 payment from the Secret Service, which was used to purchase furniture and make her car payments.

Later in the trial, upon cross-examination of petitioner, the United States was permitted, over the objection of petitioner's counsel, to introduce evidence of petitioner's prior misconduct. The evidence was that approximately three years prior to trial, petitioner printed advertisements with a facsimile of genuine United States currency on them. This evidence was admitted on the issue of intent only.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court.

The Sixth Circuit has held in this case that petitioner Dewey Sizemore's due process rights were not violated when the government failed in the course of pretrial discovery to reveal substantive payments made to its chief witness, despite the fact that if found that such conduct on the part of the government amounted to suppression of evidence favorable to the accused.

On August 23, 1977, in response to defense discovery motions, the prosecutor stated "The Government would represent that there have been no agreements between the Government and any prosecution witness."

On the first day of trial, it was discovered that the Government's primary witness, Mrs. Louise Goins (Hooker), was paid $1,500.00 by the Secret Service

prior to trial which she used to purchase furniture from her brother and for car payments.

Obviously, it is material when the United States' chief witness has been paid $1,500.00 by the United States in $100.00 bills prior to her testimony. The failure of the Government to reveal this understanding with its primary witness prior to trial violates Sizemore's due process rights, and requires a new trial. See: **United States** v. **Pfingst.** 477 F. 2d 177 (2nd Cir. 1973), certiorari denied, 412 U.S. 941 (1973). The standard for granting relief in cases of nondisclosure of information "depends upon the extent of the Government's culpability."

Dorsey v. **Warden,** Southern Michigan State Prison, 421 F. Supp. 1133, 1137 (E. D. Mich. 1976).

In this case, there was not only nondisclosure, but a deliberate misrepresentation of the facts, and a new trial is in order. **See: Welcome** v. **Vincent,** 418 F. Supp. 1088 (S.D.N.Y. 1976), reversed on other grounds, 549 F. 2d 853 (2nd Cir. 1977).

As one Court has said:

"The Government facilities for discovering evidence are usually far superior to the defendent's. This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant, the Constitution has been violated." **Lewis** v. **Clark,** 408 F. 2d 1209, 1211 (D.C. Cir. 1967).

No doubt, it would have been helpful to Dewey Sizemore's defense if the Government had revealed the payment to Mrs. Goins (Hooker), prior to trial. It chose not to, and defendent is therefore entitled to a new trial. The very integrity of our system of criminal justice depends upon full disclosure of all relevant

and required facts. **United States** v. **Nixon,** 418 U.S. 683 (1974).

The belated discovery of the payments to Mrs. Goins (Hooker) by defense counsel on cross examination was not an effective substitute for the pretrial disclosure of information favorable to the accused as required by **Brady** v. **State of Maryland,** 373 U.S. 83, (1963). Dewey Sizemore was entitled to have this information used at such a time and in such a manner in the trial of this case as his defense counsel should think best, and his defense counsel was entitled to this information prior to trial in order to properly prepare his presentation of it to the jury. The surprise revelation of this information on cross examination of the Government's witness effectively deprived petitioner of the protection delineated by this Court in **Brady, supra,** in violation of the due process clause of the 5th Amendment and therefore, the petition for the writ of certorari in this cause should be granted.

2. The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

The Sixth Circuit has held in this case that a District Court was correct in admitting evidence of a defendant's prior misconduct upon the issue of intent alone, even though the crime charged was one from the commission of which intent would be inferred, and despite the fact that Petitioner did not raise lack of intent as a defense.

The District Court, over defense counsel's objection, allowed the prosecutor to cross-examine Sizemore concerning his printing, several years ago, of advertisements having the facsimile of the back of a $20 bill on them and of his notification by a U.S. Secret Service agent that such printing of advertisements was not permitted, even as a gag. Timely objection was made to the introduction of this evidence.

Normally, evidence or prior criminal activity is not admissible to prove the commission of a subsequent offense.

"The only exceptions to that rule are that when intent, motive or lack of mistake are in issue, evidence of prior similar and related offenses tending to show a consistent pattern or conduct is admissible if accompanied by appropriate precautionary instructions." **U.S.** v. **Nemeth,** 430 F.2d 704, 705 (6th Cir. 1970)."

In this case the District Court stated at trial that ". . .evidence will be admitted only as it may or may not bear upon the issue of intent or lack of intent as it relates to the offenses charged in the indictment in this case."

Such evidence of prior misconduct is admissible **only** when intent is in issue. **United States** v. **Ring,** 513, F.2d 1001, 1007. This makes it clear that ". . .evidence of prior bad acts may not be introduced unnecessarily as a pretext for placing highly prejudicial evidence of a defendant's bad character before the jury." **Id.**

Intent is not in issue when evidence of intent would normally be inferred from the act if proven and a defendant does not claim mistake or inadvertance. **Id.** at 1009. Consequently, the so-called "intent exception" could not properly be invoked by either the District Court or the prosecution in this case to permit admission of evidence of the petitioner's prior misconduct where the requisite criminal intent would normally be inferred from the criminal acts charged in the indictment and the petitioner did not assert the defense of an innocent state of mind.

Clearly, where intent **is** an issue, proof of similar acts is admissible, as this Court recently held in **Andressen** v. **Maryland,** 427 U.S. 463, 483 (1976). However, this Court has not extended this rule to

cases involving charges such as counterfeiting, in which the act and the requisite intent are merged.

Petitioner submits that the Circuit Court has improperly extended the ambit of the **Andressen** case and Rule 404(b), Federal Rules of Evidence, by condoning the admission of evidence limited to the issue of intent when an examination of the charge reveals that intent is not an issue.

Petitioner did not advance a defense of lack of criminal intent. He contended consistently that he participated in no criminal activity. The evidence admitted by the District Court would be relevant only if petitioner admitted printing the questioned currency, but denied an intent to thereby violate the law.

The Fifth Circuit has discussed this issue in several cases, including **United States** v. **Adderley,** 529 F.2d 1178 (5th Cir. 1976), and **Bullard** v. **United States,** 325 F.2d 658 (5th Cir. 1968).

In **Adderley** the Court noted: "A defendant who denies participation in an act raises no discrete issue of intent, and if the act be proven, the intent will usually be inferred." **United States** v. **Adderley, Supra,** at 1181.

The Court in **Bullard** noted that the passing of counterfeit currency was an act in itself ambiguous, and not criminal if done innocently. **United States** v. **Bullard, Supra,** at 660 Conversely, the printing of large quantities of counterfeit currency is **not** an ambiguous act. If done, it is done with the requisite criminal intent.

It should also be noted that where, as here, intent is an integral element of the crimes charged, the prosecutor must prove it as part of his case in chief " . . .lest he find himself out of court at the close of his evidence." **United States** v. **Ring, Supra,** at 1008.

Consequently, there is even less reason for the Circuit Court to have condoned the introduction of evidence of the petitioner's prior misconduct on cross-examination of the petitioner where he has not raised the issue of intent by pleading that the act, if done, was done innocently by mistake or inadvertence.

Additionally, the Court failed to give an accompanying precautionary instruction to the jury when this evidence was placed in the record.

The Circuit Court requirements set forth in **United States** v. **Ring, supra,** include "limiting instructions cautioning the jury not to consider the evidence for improper purposes."

Also, another requirement for the introduction of such evidence is that the evidence must be of prior similar acts reasonably close in time to the offenses charged in the case. **U.S.** v. **Ring,** 513 F.2d 1001, 1005 (6th Cir. 1975); **Nemeth, supra** at 705; **Gilstrap,** v. **U.S.,** 389 F.2d 6 (5th Cir. 1968); **Whaley** v. **U.S.,** 324 F. 2d 356, 358 (9th Cir. 1963). Here the evidence of prior similar activity, according to the Government, relates to an incident which occurred in 1974 and was therefore too remote from the offenses charged against petitioner to be probative of any consistent pattern of conduct indicating intent, motive or lack of mistake.

Therefore, this Court should grant this Petition for Writ of Certiorari in order to decide the question of whether a court may properly admit evidence of prior misconduct on the issue of intent alone, in cases in which intent is not an actual issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

HUGH J. MOORE, JR.
CARTER J. LYNCH, III

Witt, Gaither &
Whitaker
1100 American National
Bank Building
Chattanooga, Tennessee
37402

Counsel for Petitioner

July 31, 1978

APPENDIX A

77-5381

UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

V.

DEWEY HAROLD SIZEMORE,
Defendent-Appellent

Decided and Filed June 20 1978

Before: WEICK, ENGEL and MERRITT, Circuit Judges

Dewey Harold Sizemore was found guilty of all four counts of an indictment charging him with

conspiracy and violation of the federal counterfeiting laws. In his direct appeal Sizemore has raised the following issues:

I. That there was insufficient evidence of his guilt to have sustained his conviction on the four counts.

II. That the government failed to prove beyond a reasonable doubt the existence of a conspiracy and his own connection with it and, therefore, the trial court should have granted his motion for a directed verdict.

III. That by the use of repeated and improper leading questions put to the principal government witness against him, a Mrs. Goins, and by the misstatement of testimony during its closing argument, the government deproved him of a fair trial.

IV. That his due process rights were violated when the government offered into evidence a statement of the defendant which had not been previously provided his counsel in pretrial discovery and when the government failed in the course of pretrial discovery to reveal substantial payments made to its chief witness.

V. That the court erred in failing to suppress certain evidence seized in a warrantless search of Sizemore's automobile on June 9, 1977, even though such evidence was never introduced at trial.

VI. That the court erred in failing to strike the entire jury panel after a prospective juror commented in front of it upon newspaper articles concerning the events and individuals involved in the trial.

VII. That the court erred in admitting evidence of the defendant's prior conduct in manufacturing a facsimile of currency for advertising purposes when that conduct was innocent and when it was claimed that his specific intent was not in issue with respect to

the crimes charged.

It appeared during the cross examination of prosecution witness Goins that she had been paid a total of $1,500 by the government for living expenses, although in the court-ordered response to defense discovery motions the prosecution had before trial stated. "The government would represent that there have been no agreements between the government and any prosecution witness." Notwithstanding the government's claim that its answer was responsive and that its failure to apprise the defense of the payments was an oversight, the court determines that the government's conduct in failing to disclose the payments after a specific request for such information amounted to a suppression of evidence favorable to the accused within the meaning of **Brady v. State of Maryland,** 373 U.S. 83 (1963). Nevertheless, because the fact of payments was discovered by the diligence of defense counsel and fully displayed to the jury, the court is satisfied that the government's nondisclosure was harmless beyond a reasonable doubt.

Upon a consideration of the record as a whole, the court is further satisfied that there is no merit in any of the other contentions raised by Sizemore upon appeal, that the verdict was fully supported by competent evidence, and that he received a fair trial. Accordingly,

IT IS ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

John P. Hehman (Clerk)

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 1978,

three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to John Cary, United States Attorney, U.S. Post Office and Courthouse in Knoxville, Tennessee, 37302, and Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

HUGH J. MOORE, JR.
1100 American National
Bank Building
Chattanooga, Tennessee
37402

Counsel for Petitioner

No. 78-181

In the Supreme Court of the United States

OCTOBER TERM, 1978

DEWEY H. SIZEMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-181

DEWEY H. SIZEMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1978. The petition for a writ of certiorari was not filed until August 1, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1]

---

[1] A "Motion for Leave to File Out of Time Petition for Writ of Certiorari," stating that petitioner's counsel erroneously believed the time limit to be governed by 28 U.S.C. 2101(c) rather than Rule 22, is appended to the petition.

QUESTIONS PRESENTED

1. Whether the government's failure to disclose payments made to a key witness denied petitioner a fair trial where the witness revealed these payments during her trial testimony.

2. Whether, in a prosecution for counterfeiting $20 bills, petitioner was properly cross-examined as to whether he had previously printed advertisements bearing a facsimile of a $20 bill.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on four counts of conspiracy and counterfeiting, in violation of 18 U.S.C. 371, 471, and 474, and received concurrent terms of five years' imprisonment for conspiracy and six years' imprisonment for the counterfeiting offenses. The court of appeals affirmed (Pet. App. A).[2]

The evidence at trial showed that Anita Goins, the girlfriend of co-conspirator Caesar Ybarra, informed the Cleveland (Tennessee) Police Department that petitioner, petitioner's wife, and Ybarra were counterfeiting money at petitioner's printing establishment (Tr. 12-13, 85-87). This information was relayed to the Secret Service, which thereafter maintained surveillance of the print shop for several days. On the evening of June 9, 1977, in the presence of petitioner and his wife, federal agents executed a search warrant covering the print shop (Tr. 88-89). They seized various items relating to the illegal counterfeiting

[2]Co-indictee Caesar Ybarra pleaded guilty before trial. Dorothy Mae Sizemore, petitioner's wife, was similarly convicted and was sentenced to probation for three years. She did not appeal her conviction.

scheme, including boxes of fully and partially printed counterfeit $20 Federal Reserve notes, a printing press, a printing plate, enlarged photographs of the face and back of a $20 bill, several negatives used in printing the bogus notes, an enlarger, and empty cans of green ink of the same type as was used to print the bills (Tr. 90-106, 111; Gov't Exhs. 1-18). The total face value of the fully printed bills was $5,220, and of the partially printed bills, $245,160 (Tr. 112).

Petitioner took the stand in his own defense and denied knowledge of or involvement in the counterfeiting activity (Tr. 256). He testified that he had discovered the printed bills stacked up upon returning to his printing shop following a coffee break on the evening of June 9 (Tr. 247-248).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the government's failure to respond accurately to a pre-trial discovery motion by disclosing its payments to a prosecution witness mandates that petitioner receive a new trial. However, as the court of appeals concluded, the government's nondisclosure here was harmless beyond a reasonable doubt.

It is undisputed that the government erroneously represented that "there have been no agreements made between the government and any prosecution witness" in response to petitioner's specific pre-trial discovery request concerning such agreements. In reality, prosecution witness Anita Goins had received relocation money from the government when she moved from Cleveland, Tennessee to Huntsville, Alabama for protective purposes (Tr. 51-52, 77-79, 125-127).[3] Additionally, the government

[3]Caesar Ybarra, co-conspirator of petitioner's and Goins' boyfriend, had apparently threatened Goins.

gave this witness $1,500 upon her return to Cleveland (Tr. 52-57). Goins was not paid for her testimony at trial nor was she promised any additional funds or favors depending on the outcome of petitioner's trial (Tr. 53, 56-57).

Nevertheless, there is no merit to petitioner's claim of prejudice from the government's failure to disclose its financial arrangements with Goins. Defense counsel skillfully and repeatedly cross-examined both Goins and a government agent about the payments (Tr. 52-57, 73, 125-127, 147; see also Tr. 77-79) and thereafter used this testimony to base a strong attack on her credibility in their closing arguments (Tr. 303-304, 308, 315-316, 318; see also Tr. 296 and 324-325). The jury was thus fully apprised of this impeaching evidence, but nonetheless chose to convict petitioner upon overwhelming evidence of his complicity. In such circumstances, there is no "concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). Since petitioner had the full benefit of the evidence, he suffered no prejudice and his conviction was correctly affirmed. See *United States* v. *Acosta*, 526 F. 2d 670, 674-675 (5th Cir.), cert. denied, 426 U.S. 920 (1976); *United States* v. *Decker*, 543 F. 2d 1102, 1105 (5th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Stone*, 471 F. 2d 170, 173-174 (7th Cir. 1972), cert. denied, 411 U.S. 931 (1973).

2. Petitioner also claims (Pet. 11-14) that the district court erred in allowing the prosecution to cross-examine him about a prior similar act. Three years prior to the incident for which petitioner was convicted, the Secret Service reprimanded him for printing advertisements that included a facsimile of the back of a $20 bill. Additionally, the Secret Service compelled petitioner to

surrender the printing plate and negative used in this endeavor (Tr. 266-267). After carefully listening to counsel's arguments concerning this evidence, the district court ruled that it was admissible to prove petitioner's intent.[4]

Even if petitioner is arguably correct that the prior conduct was improperly admitted to prove intent, the district court did not err in allowing the prosecutor to cross-examine petitioner about this incident. The Federal Rules of Evidence render similar act testimony admissible for any relevant purpose other than "to prove the character of a person in order to show that he acted in conformity therewith." Fed. R. Evid. 404(b); see also *United States* v. *Benedetto*, 571 F. 2d 1246, 1248-1249 (2d Cir. 1978). Here, the challenged evidence was relevant to demonstrate petitioner's specialized knowledge about printing counterfeit currency and his ability to commit the crimes in question. See, *e.g.*, *United States* v. *Craft*, 407 F. 2d 1065 (6th Cir. 1969). Nor can it be fairly argued that the trial judge abused his broad discretion in admitting such probative similar act evidence. See *United States* v. *Williams*, 577 F. 2d 188, 193 (2d Cir. 1978), petition for cert. pending, No. 78-5029; *United States* v. *Fairchild*, 526 F. 2d 185, 189 (7th Cir. 1975) (Stevens, J.), cert. denied, 425 U.S. 942 (1976). Finally, in light of the overwhelming evidence against petitioner and the minimally prejudicial nature of the complained of cross-examination, any error involved was harmless beyond a reasonable doubt.[5]

---

[4]At the same time that he ruled the printing incident admissible, the trial judge precluded the prosecutor from making any reference to petitioner's less relevant prior convictions.

[5]Petitioner further points out (Pet. 14) that the district judge did not give the jury limiting instructions concerning the evidence at the time of its admission. However, petitioner failed to request such a charge and cannot now be heard to complain. Cf. Fed. R. Crim. P. 30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA CRISCITELLI
Attorney

SEPTEMBER 1978

DOJ-1978-09